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No. 213

In the Supreme Court of the United States

OCTOBER TERM, 1935

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, EXECUTORS OF THE ESTATE OF WILLIAM M. GREENE, PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. GREENE, executors of the estate of William M. Greene, petitioners

v.

THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 18–28) is reported in 9 F. Supp. 817.

JURISDICTION

The judgment of the court below was entered February 14, 1935. (R. 28.) A motion for new trial was overruled April 8, 1935. (R. 29.) The petition for a writ of certiorari was filed July 3, 1935 (R. 29), and was granted October 14, 1935. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of a life insurance policy, which was surrendered for its value in paid-up insurance in 1912, may be included in the insured's gross estate under Section 302 (g) of the Revenue Act of 1926, where the insured's interest ceased and the beneficiaries' interests became absolute only at the insured's death in 1930.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> * * * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 411.)

STATEMENT

The findings of fact of the Court of Claims (R. 15-17) may be summarized as follows:

The petitioners are the executors of the estate of William M. Greene, who died on May 30, 1930. (R. 15.) On May 29, 1931, the petitioners filed an estate-tax return disclosing a Federal tax of $24,168.27 (after allowance for a credit of $96,673.10 for State inheritance tax), which was paid on that date. (R. 15.)

A life-insurance policy taken out by the decedent on his own life in the Union Central Life Insurance Co., and payable to the decedent's children, was included in the gross estate in the return, less $40,000 thereof, which exemption was allowed by the Commissioner. (R. 15.)

A paid-up policy of $42,000, taken out by the decedent in the Equitable Life Assurance Society, was not included in the gross estate in the return filed by the petitioners, but was included by the Commissioner in his final determination, and is the policy involved in this suit. (R. 15.)

On October 17, 1932, a closing agreement with respect to the tax liability of the estate was entered into by the petitioners and the Commissioner, with the approval of the Undersecretary of the Treasury, by which it was determined that the correct tax liability was $128,197.73, subject to a credit not to exceed 80% for State estate, inheritance, legacy, or succession taxes, and also subject to a reservation by the petitioners of the right to file a claim for refund in regard to the tax involved in the inclusion of the $42,000 Equitable Life Assurance Society policy in the gross estate. (R. 15–16.) On November 1, 1932, after taking the appropriate credits for State inheritance taxes, the petitioners paid the full amount of the balance of the tax in the sum of $1,471.28, with interest. (R. 16.)

The $42,000 Equitable policy was dated March 2, 1892, and contained the following provisions (R. 16–17):

> Does promise to pay to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said William M. Greene, or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said William M. Greene, at the office of the society in the city of New York, fifty thousand dollars, upon satisfactory proofs of the death of said William M. Greene, * * *.

At the end of the tontine period, namely, March 2, 1912, the policy gave the insured a choice of six

methods of settlement. (R. 17.) On February 19, 1912, the decedent endorsed on the policy the following (R. 17):

> Surrendered as of Mch. 2, 1912, for its value in paid-up insurance.

The insurance company, by an appropriate official, endorsed the policy March 4, 1912, agreeing that the policy had become a paid-up policy of $42,000. (R 17.)

The decedent's wife died before him, but he was survived by his three children, to whom the proceeds of the policy were paid upon the death of the decedent. (R. 17.)

The tax paid by the estate, because of the inclusion in the gross estate of the proceeds of the $42,000 policy, was $756. (R. 17.) For that amount the petitioners, on November 3, 1932, filed a claim for refund, stating as grounds thereof: (1) that the beneficiary was not the estate of the insured; (2) the decedent had no right to change the beneficiary; (3) the decedent had no right to borrow money on the policy; and (4) the decedent could not receive the cash-surrender value of the policy. (R. 16.) It was further contended in the claim that the fact that the policy was payable to the insured's estate in the event of his survival of the beneficiaries did not make the policy taxable. (R. 16.) The claim for refund was rejected by the Commissioner August 23, 1933. (R. 16.)

The court below dismissed the petition. (R. 28.)

SUMMARY OF ARGUMENT

Section 302 (g) of the Revenue Act of 1926, *supra*, p. 2, requires the proceeds of all insurance policies taken out by a decedent on his own life to be included in his gross estate, with an exemption of $40,000 when the proceeds are not receivable by the estate. Subdivision (h) makes the statute applicable no matter when the policies were issued or became paid up. The language of the statute is clear and needs no judicial construction.

Lewellyn v. *Frick*, 268 U. S. 238, dealt with an earlier statute which was not made specifically applicable to policies issued prior to its enactment. Furthermore, the decision in *Lewellyn* v. *Frick*, *supra*, has not been construed as preventing the statute from applying to policies issued before its passage where it has been pointed out that the insured retained an interest in the policy until his death and that his death enlarged and made absolute the interests of other beneficiaries.

Insurance is by nature testamentary in character and may be properly included in the insured's gross estate as a substitute for a testamentary disposition. The date of the issuance of the policy is not important for the tax is laid on account of events occurring at the insured's death. We contend further that the manner in which the insured directed the policy to be paid removes any retroactive operation of the statute. The policy was payable to the insured's wife, if living; if not living, to the sur-

viving children, and if there were no surviving children, to the insured's estate. Thus, the insured retained an interest in the policy, for had he survived his wife and children, the proceeds would have been payable to his estate. In this case the insured's death before the death of the children was the event which made certain that the estate would not take and made the children's interest for the first time absolute. The insured's death was therefore a source of valuable assurance to the children and enlarged their property rights. Those circumstances justify the tax, and since they occurred in 1930, there is no retroactive application of the statute.

The amount includable in the gross estate need not be limited to the value of the insured's conditional interest in the policy, for it is established that the completion of the shifting of the economic benefits of property justifies a tax measured by the full value of the property.

ARGUMENT

I

THE STATUTE PLAINLY REQUIRES THE PROCEEDS OF THE POLICY TO BE INCLUDED IN GROSS ESTATE

Section 302 (g) of the Revenue Act of 1926, *supra*, requires to be included in the decedent's gross estate the amount receivable by the executor as insurance under policies taken out by a decedent upon his own life and the amount in excess of

$40,000 receivable by all other beneficiaries as insurance under such policies. Subdivision (h) of the same section requires the value of the various transfers, property interests, and powers, described in the section, to be included in gross estate

> whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

There is, we submit, no room for construction of the statute. Its language is clear, embracing the proceeds of all life insurance policies no matter when issued or when they have become paid up. Particularly here, where, as we contend, the insured retained an interest in the policy until his death, there is no doubt that the statute requires the proceeds of the policy to be included in gross estate. *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412 (C. C. A. 2d); cf. *Union Trust Co.* v. *United States*, 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547.

Lewellyn v. *Frick*, 268 U. S. 238, relied upon by the petitioners, was concerned with the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 402, which contained no specified direction with respect to its application to policies issued before its enactment. The case cannot therefore be considered as authority for the construction of the statute involved here, which contains such a direction. *Nichols* v. *Coolidge*, 274 U. S. 531, 539. Furthermore, the *Frick* case, in view of subsequent decisions of this Court (e. g., *Chase National Bank* v. *United States*,

278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339), has not been interpreted as preventing a construction of the early statute to include policies issued prior to the passage of an estate tax statute, where, as here, it has been called to the Court's attention that the insured retained an interest in the policy until his death and that death resulted in an enlargement of the property rights of others interested in the policy. *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), certiorari denied, 286 U. S. 561; *Liebes* v. *Commissioner*, 63 F. (2d) 870 (C. C. A. 9th); *Bingham* v. *United States*, 76 F. (2d) 573 (C. C. A. 1st), pending on writ of certiorari, No. 83. In our brief in the *Bingham* case we have included an argument supporting that decision in this respect. If our contention presented there is correct, we submit that the same result must be reached here *a fortiori*. In any event, we submit that the statute here plainly requires the policy to be included in the gross estate and that its language leaves no room for doubt.

II

THE STATUTE AS APPLIED TO THE POLICY INVOLVED HERE DOES NOT VIOLATE THE CONSTITUTION

We contend that insurance is inherently testamentary in character and may therefore be properly included in the measure of the insured's gross estate for purposes of the estate tax. Our argument that the taking out of insurance is a substitute for testamentary disposition of property, is set forth

in our brief in *Bingham* v. *United States, supra,* and is not repeated here.

The statute does not tax the transfer of the decedent's interest in the policy. It does not deal with any transfer from the decedent. The fundamental theory of the statute is that the insurance proceeds are treated as a fund built up by the payment of premiums with money which might otherwise remain as a part of the decedent's estate when he died, and the insurance policy is regarded as a contract made by the decedent for the benefit of the beneficiaries after his death.

Like the provision dealing with estates by the entireties (Section 302 (e), Revenue Act of 1926), the provision with respect to insurance proceeds requires their inclusion in the gross estate irrespective of whether there is any transfer at death. As in *Tyler* v. *United States,* 281 U. S. 497, the question here is, not whether in the strict sense of the word there has been a transfer, but whether death has brought into being or ripened for the survivor property rights of such a character that Congress may properly include their value in the same class as testamentary dispositions.

If it is accepted that insurance is inherently of a testamentary character, then the question of the validity of this provision should be answered here as was the similar question in the *Tyler* case, namely (p. 502):

> If the event is death and the result which is made the occasion of the tax is the bringing

> into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

In this view no question of retroactivity is involved. The effect caused by the decedent's death is not changed, nor is the enlargement of property rights of the beneficiaries affected, by the date of the insurance policy. The question of retroactivity is as unimportant here as it was in *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577, where the estate by the entireties was created prior to 1916.

In this view, decisions dealing with the taxation of strict transfers are not in point, since it is the event of death and not the terms of any instrument which justifies the tax.

It is true that the Treasury Regulations limit the application of Section 302 (g) to those cases where the decedent retained an interest in the policy. Reg. 80, Art. 27. In view of what has been said above, we think that the regulations have unnecessarily limited the application of the statute and, to that extent, may be disregarded. If, however, the application of the statute is properly limited, as indicated by the regulations, we contend that in this case the decedent did retain such an interest as to bring the proceeds of this policy

within the terms of the regulations and the statute. Over and above his general interest in the preservation of the contract (*Burnet* v. *Wells*, 289 U. S. 670, 679), the decedent made such arrangements that his estate might have collected the proceeds of the policy.

The policy was payable to the insured's wife, if living, and if not living, to his surviving children, or, if there were no surviving children, then to the insured's estate. Thus, the insured retained an interest in the policy, for had he survived his wife and children his estate would have been the beneficiary. How the interest is to be described or classified is immaterial. As this Court said in *Klein* v. *United States*, 283 U. S. 231, 234:

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

However the insured's interest may be described, its extinguishment occurred only upon the event of his death before the death of the other beneficiaries.

The chances of all eventually to take the proceeds of the policy were subject to conditions. The insured's estate took if the insured survived his wife and his children. The wife took if she survived the insured. The children took if the insured survived his wife, and the children survived the insured. Though the chances of some may have been better than others it is clear that the death of the insured before the others was, as in the *Klein* case, "the indispensable and intended event" which made certain that the proceeds of the policy would not go back to the estate. As happened in this instance, the insured's death, after his wife had died, made the children's interest for the first time absolute. The insured's death, therefore, was for the children a "source of valuable assurance passing from the dead to the living" (*Porter* v. *Commissioner*, 288 U. S. 436, 444), and brought into being for the children an "enlargement of property rights." *Tyler* v. *United States, supra*, p. 502. It has frequently been held by this Court that when death completes the shifting of the economic benefits of property, producing such results as have been described, the property involved may constitutionally be included in the decedent's gross estate. *Chase National Bank* v. *United States, supra; Reinecke* v. *Northern Trust Co., supra; Tyler* v. *United States, supra; Porter* v. *Commissioner, supra; Gwinn* v. *Commissioner*, 287 U. S. 224;

Klein v. *United States, supra;* see also *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.); *Sargent* v. *White,* 50 F. (2d) 410 (C. C. A. 1st).

The petitioners concede that where the insured reserves the right to change the beneficiary or to take down the cash surrender value of the policy, there is no constitutional objection to including the proceeds of the policy in the insured's gross estate. (Br. 12.) The petitioners seem to draw the conclusion that the insured must have power, during his lifetime, to destroy the interests of the other beneficiaries in order for the tax to escape constitutional objection. We submit, however, that the Constitution makes no such requirement. With respect to property held under tenancies by the entirety it is perfectly clear that the decedents cannot during their lifetime destroy or modify the interests of their co-tenants, and yet it has been held that the value of such property may constitutionally be included in gross estate. *Tyler* v. *United States, supra; Third National Bank & Trust Co.* v. *White,* 287 U. S. 577, affirming *per curiam,* 58 F. (2d) 1085 (C. C. A. 1st), affirming *per curiam,* 45 F. (2d) 911 (Mass.); *Robinson* v. *Commissioner,* 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States,* 8 F. Supp. 694 (C. Cls.), certiorari denied May 27, 1935, No. 871, October Term, 1934. No tax problem or constitutional question was involved in *Washington Central Bank* v. *Hume,* 128

U. S. 195, and the insured, as pointed out by the court below, did not retain any interest in the proceeds of the policies.

The tax being grounded upon circumstances accompanying the insured's death in 1930, there is no retroactive operation of the statute. In *Reinecke* v. *Northern Trust Co., supra,* this Court had before it two trusts created before the passage of any estate tax statute, in which the settlor had reserved the power of revocation. Upon the settlor's death the Commissioner included the corpus of the trusts in the gross estate. It was objected that the Commissioner's action gave the statute a retroactive application forbidden by *Nichols* v. *Coolidge, supra.* But this Court pointed out (p. 345) that the statute

> as applied to the present transfers, is not retroactive, since his death followed the passage of the statute.

That reasoning, we submit, is applicable here. This Court again clearly pointed out why the rule of *Nichols* v. *Coolidge, supra,* is inapplicable when the decedent retains an interest in the property, in *Gwinn* v. *Commissioner, supra,* where objection was made to the inclusion in the gross estate of the value of the decedent's interest in a joint tenancy created in 1915. There this Court speaking of *Nichols* v. *Coolidge, supra; Coolidge* v. *Long,* 282 U. S. 582, and *Untermyer* v. *Anderson,* 276 U. S. 440, said (p. 229):

> In them the rights of the survivors became finally and definitely fixed before the passage of the act—nothing was added as the result of death.

We submit, therefore, that the lower courts have been correct in upholding the tax with respect to insurance policies in which the insured has retained an interest, even though the policies were issued prior to the passage of an estate tax law. *Heiner* v. *Grandin, supra*—insured reserved power to change beneficiary; *Liebes* v. *Commissioner, supra*—power to change beneficiaries or to revoke the policy; *Levy's Estate* v. *Commissioner, supra*—power to change beneficiary; *Bingham* v. *United States, supra*—interests similar to the case at bar; power to take the cash surrender value in some policies; cf. *Union Trust Co.* v. *United States, supra.*

Lewellyn v. *Frick, supra,* does not control the constitutional question here. In that case the question of the power of Congress to include in the gross estate proceeds of insurance policies issued before the passage of an estate tax was specifically reserved from decision (p. 251). Furthermore, it appears that the effect of the rights retained by the insured in the policies involved in that case was not raised by the Government nor considered in the opinion of the Court. We submit, therefore, that any expressions of doubt on the part of this Court in that decision with respect to the constitutionality of the statute requiring the inclusion in the gross estate of the proceeds of insurance policies issued prior to

the passage of an estate tax law have less than the usual authority of statements not required by the decision. See *Heiner* v. *Grandin, supra;* cf. *Webster* v. *Fall,* 266 U. S. 507, 511; *United States* v. *Mitchell,* 271 U. S. 9, 14.

The petitioners' contention that the tax should not be measured by the face value of the policy is without merit. Sec. 302 (g) allows a specific exemption of $40,000, but does not allow a deduction on account of interests in the proceeds held by others than the insured. In *Chase National Bank* v. *United States, supra,* the tax was measured by the entire proceeds of an insurance policy, although the surrender value while the decedent lived was much less than this amount, and the proceeds after his death were not available to his estate. In other decisions it has been held proper to measure the tax by the entire value of the property although the interest of the decedent was at all times subject to substantial rights irrevocably granted to others. *Tyler* v. *United States, supra; Third National Bank & Trust Co.* v. *White, supra.* In *Porter* v. *Commissioner, supra,* the tax was measured by the entire value of the property although the decedent had transferred the property in such a way that he had no power to use it for his own benefit. See also *O'Shaugnessy* v. *Commissioner,* 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605; *Commissioner* v. *Emery,* 62 F. (2d) 591 (C. C. A. 7th).

CONCLUSION

The court below correctly held that the proceeds of the policy should have been included in the decedent's gross estate and that the Constitution does not prevent its being included. The judgment of the court below should be affirmed.

Respectfully submitted.

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